United States Department of Justice

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

WASHINGTON, D.C. 20530

25 APR 1980

Honorable James T. McIntyre, Jr.
Director
Office of Management and Budget
Washington, D. C. 20503

Dear Mr. McIntyre:

The Department of Justice has been asked by Chairman Ribicoff to comment on the "Paperwork Reduction Act of 1980" (H.R. 6410 and S. 1411). We prefer at this point to present our objections to the bill to OMB so that we may facilitate acceptable compromises that will allow us to support the bill.

The Department of Justice supports the effort to reduce the paperwork burden which the federal government imposes on the public unnecessarily. To the extent that any of our forms or questionnaires are answered by the general public for statistical purposes (e.g. those sent out by the Law Enforcement Assistant Administration and the Immigration and Naturalization Service), they are cleared by OMB in compliance with the Federal Reports Act of 1942 (44 U.S.C. § 3501 et. seq.). H.R. 6410 would, however, distort the purpose of paperwork reduction by broadening, perhaps unintentionally, its application to include information gathered for law enforcement and litigation purposes.

The most objectionable departure from the Federal Reports Act of 1942 lies in the definition section. Under present law, "information" is defined as "facts obtained or solicited by the use of written report forms . . . which are to be used for statistical compilations of general public interest." (44 U.S.C. § 3502, emphasis added). H.R. 6410 broadens the definition to include ". . . facts or opinions for any purpose . . ." (§ 3502(2), emphasis added). This language is intended to cover all information requests sent to ten or more persons (see House Rep. No. 835, 96th Cong., 2nd Sess. (1980) p. 19). Presumably that would include subpoenas, interrogatories, Civil Investigative Demands, (C.I.D.s) and information necessary for criminal law enforcement. A provision which mandates that, for instance, every interrogatory sent to ten persons (even if members of the same corporate defendant) must be cleared by OMB is not only a logjam to efficient judicial proceedings but, more importantly, is an intolerable interference in the conduct of civil and criminal investigation and litigation. It would also be

politically inadvisable for OMB to begin to make investigation and litigation decisions by approving or disapproving interrogatories.

We do not believe that the delegation authority as provided in § 3507(e) of the bill is sufficient to quell our objections. Even if the Director delegates to the Attorney General the power to "approve" all information requests, such delegation may only be valid for three years and is subject to rescission at any time. Furthermore, § 3507(e) merely allows delegation of the power to "approve" and does not remove the obligation to submit the collection requests to OMB, nor does it exempt the information received from dissemination to other agencies. Civil Investigative Demands, for example, are confidential by law (15 U.S.C. 1311 et. seq.) and to reveal their contents to OMB even for the purpose of approving them, would violate statute's intent. The provisions in the bill for sharing the information with other agencies are subordinated to other laws protecting confidentiality (e.g. § 3510). The provisions for submission and approval have no such protection. In fact, all information collection requests are to be published, regardless of their confidential nature, in the Federal Register according to § 3507(a)(2) of the bill.

The final fear we have concerning approval by OMB of our information collection requests lies in § 3512 of the bill. This provision allows any recipient of an uncleared C.I.D., for example, to refuse to answer without fear of being held in contempt of court. Unless litigation-related information collections are exempted from the bill, the Government's opponents in litigation will have an unexpected bonus. At the very least, the effective dates of § 3512 and the bill in general (Sec. 5) should coincide.

On a related minor point, we would like the legislative history of the definition section to explain that the bill is not meant to cover information requests sent to other federal agencies or agents. The definitions in H.R. 6410 do not make that clear.

The second major area of concern is § 3510 which empowers the Director of OMB to direct an agency to share the information garnered. If the definition of collection of information is changed to exempt those requests sent for law enforcement, litigation, or intelligence purposes, we would have no objection to § 3510. Absent such change, we are troubled by its ambiguous language. It is not clear whether the Director may only direct access to another agency if all three conditions are met or if one of the three conditions are met. Specifically, if the information is protected, for example, by Sec. 229 of the Juvenile Justice and Delinquency Prevention Act of 1974 (42 U.S.C. § 5639) may it still be released under subsection (3) of § 3510 of the bill if the person who supplied the information consents to the disclosure, even if that person was not the juvenile

involved? If the answer is "yes", the Department of Justice objects and submits alternative language herein.

Our third major objection concerns granting access to the Director under § 3515 and to the General Accounting Office (GAO) under § 3519 of the bill.

§ 3515(b) states that each agency "shall" furnish access to all information to the Director if the Director determines it necessary, unless such access is prohibited by law. Our proposed amendment to § 3515 addresses our concerns. We would also like the legislative history to point out that the burden would be on the Director to prove that each specific piece of information he seeks is necessary to performance of his duties under this Act. The legislative history should also give examples of the types of laws that prohibit forced access such as the Privacy Act, (5 U.S.C. § 552a), the exemptions to the Freedom of Information Act (FOIA) (5 U.S.C. § 552(b)), the Justice System Improvement Act of 1979 (42 U.S.C. 3789g), the Juvenile Justice and Delinquency Prevention Act of 1974 (42 U.S.C. 5639), and, of course, the Federal Rules of Evidence, Civil, and Criminal Procedure, as well as 28 C.F.R. 1.6 which flows directly from the Constitution and limits disclosure of information used by the President in exercising his power of pardon. This is not an exhaustive list but indicates the type of information currently protected by law.

These limitations are crucial because of the relationship between § 3515 and § 3519. If the Director has access to all the information of an agency (§ 3515) and the ". . . Comptroller General shall have access to all books, documents, papers, and records of that Office [of Federal Information Policy within OMB]" (§ 3519), it may defeat the effect of the General Accounting Office Act of 1980 which, inter alia, allows an agency to withhold information exempted from disclosure under FOIA. Under the scheme of this bill, the GAO would gain access through the Director to information it could not receive under present law. Therefore, § 3519 should limit GAO to the access and process it possesses under current law. Without that qualification, an agency might be justified in refusing access to the Director on the grounds that GAO would have access not otherwise available.

We have one last objection to H.R. 6410 concerning the power of the Director to designate one agency the central collection agency (§ 3509). In the case of parole determinations, investigative activities are assigned on a case-by-case basis among the Parole Commission, the Administrative Office of United States Courts, the Bureau of Prisons and other investigative agencies. It is the role of the Parole Commission to determine what information is necessary to make a parole decision (18 U.S.C. 4204(b)(4)). Investigations for probation recommendations are made by the Administrative Office of United States Courts, a branch of the Judiciary.

The approval or disapprovel by OMB of such information collection may constitute an encroachment into the powers of the judicial branch.

Furthermore, the Parole Commission must often make quick information requests in connection with parole revocations. This would not be possible if the Parole Commission were not designated the collection agency or it had to wait as much as 60 days for OMB approval.

Those are our concerns with H.R. 6410. Enclosed are suggested amendments which we hope you will support. Thank you for your prompt consideration. Please contact me if you have any questions.

Sincerely,

Alan A. Parker
Assistant Attorney General

Enclosure